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Supreme Court, U.S.
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No. 05-260

IN THE

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners Joel and Marlene Sereboff respectfully submit this reply brief in further support of their petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit in this case.

I. NOTHING PRESENTED IN THE OPPOSITION WARRANTS DENYING THE PETITION.

In its Opposition to Petition for Writ of Certiorari ("Opposition"), Mid-Atlantic Medical Services, Inc. ("Mid-Atlantic") implicitly acknowledges that this case satisfies all of the criteria for Supreme Court review. For example, Mid-Atlantic admits in its Opposition that there is a split among the circuits regarding the Question Presented. *See* Opposition at 5 ("Petitioners correctly assert a conflict among the courts of appeal on the questions presented"). While Mid-Atlantic does not explicitly address the issue of whether this case is a matter of exceptional importance, it acknowledges that the Department of Labor and the Solicitor General recognize the importance of this issue. *See* Opposition at 16, fn. 5.

The only basis Mid-Atlantic offers for denying the Petition here is its assertion that the split between the Fourth, Fifth, Seventh and Tenth Circuits, on the one hand, and the Ninth and Sixth Circuits, on the other hand, may eventually be resolved by *en banc* rehearings or legislative action. This assertion has no basis.

Mid-Atlantic claims that the split could resolve itself because "it is possible that en banc decisions could bring both [the Ninth and the Sixth] circuits into alignment with the other circuits." *See* Opposition at 11. However, a footnote in Mid-Atlantic's own opposition undercuts this argument. In footnote 2, Mid-Atlantic acknowledges that both the Ninth and Sixth Circuits have rejected petitions for rehearing on the very issue at stake in this Petition. Opposition at 11-12, n 2. Hence, there is no reason to believe that an *en banc* decision from either circuit reversing their entrenched positions is forthcoming.

Mid-Atlantic also suggests that the circuit split could resolve itself via legislative action. However, Mid-Atlantic later acknowledges that: "Given the unpredictability of the legislative process, it is admittedly doubtful that the proposed amendment to § 502(a)(3) will be enacted." *See* Opposition at 12.

In sum, Mid-Atlantic has only offered speculation as to how the present deep split among the circuits may be resolved. Such speculation should be given no weight.

II. THE SOLICITOR GENERAL HAS RECOGNIZED THAT THIS CASE IS THE APPROPRIATE VEHICLE FOR RESOLVING THE SPLIT AMONG THE CIRCUITS.

In a brief filed as amicus curiae in United States Supreme Court Case No. 04-0109, *Carpenters Health and Welfare Trust for Southern California, Petitioner v. Timothy Vonderharr et al.*, (U.S. October 21, 2005) the Solicitor General acknowledges that this case is the appropriate

vehicle for resolving the current split among the circuits. The Solicitor General observed:

> The petition for a writ of certiorari in *Sereboff* presents the Section 502(a)(3) question. The respondent in *Sereboff* is a plan fiduciary entitled to generally to bring an action under 29 U.S.C. 1132(a)(3). *See* note 2., *supra*. Although the respondent in *Sereboff* originally waived its right to file a response in the certiorari petition, this Court requested on September 27, 2005, that a response be filed. Based upon our review of the petition and the lower court decision in *Sereboff*, it appears that *Sereboff* squarely presents the Section 502(a)(3) issue and would likely be an appropriate case in which this Court could resolve the conflict in the circuits.

Amicus Curiae at 6, n. 3.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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